No. 14-723

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MONTANILE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

AARP is a nonprofit, nonpartisan organization, with a membership that helps people over the age of 50 turn their goals and dreams into real possibilities, seeks to strengthen communities, and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits which countless members and older individuals receive or may be eligible to receive.

Participants in private, employer-sponsored employee benefit plans rely on the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et. seq.* (2012), to protect their rights under those plans. In particular, ERISA's protections, and plan participants' opportunities to enforce those protections, are of vital concern to

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[1] Pursuant to Supreme Court Rule 37, counsel of record received timely notice of the intent to file this brief and, on behalf of the parties, have consented to the filing of this brief. No counsel for a party authored this brief, in whole or in part; and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No party other than amicus or its counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of amicus briefs have been filed with the Clerk of the Court.

workers of all ages and to retirees, as the quality of their lives depends heavily on their eligibility for, and the amount of, retirement and welfare benefits.[2]

The resolution of this issue regarding reimbursement agreements in health plans will have an impact far beyond this case.[3] AARP notes that the Court's decision will impact disputes ranging from participant fraud on the plan, *Trustees of the AFTRA Health Fund v. Biondi*, 303 F.3d 765 (7th Cir. 2002) (keeping ex-spouse on health plan in violation of plan eligibility rules), to a plan's mistaken approval for health procedures that was relied upon to the

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[2] AARP has participated as amicus curiae in this Court to protect the rights of workers and their beneficiaries under ERISA. *See, e.g., CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

[3] For example, some health plans with reimbursement provisions refuse to pay any portion of attorneys' fees. Accordingly, part of the decision as to whether a participant should sue a third party tortfeasor is the amount, if any, of potential recovery. After payment of attorneys' fees and expenses, the participant's recovery could be less than the amount of medical benefits paid, and the participant could actually wind up owing the plan more than received from the tort case. *See, e.g., FMC Corp. v. Holliday*, 885 F.2d 79, 80 (3d Cir. 1989), *vacated and remanded*, 498 U.S. 52 (1990); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Shank*, 500 F.3d 834, 835 (8th Cir. 2007); *U.S. Airways, Inc. v. McCutchen*, 2010 U.S. Dist. LEXIS 89377, at *2-3 (W.D. Pa. 2010).

participant's detriment, *cf. Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869 (7th Cir. 2013) (after approval for gastric bypass surgery, participant underwent surgery and plan refused to pay), to disability benefit offsets. *E.g.*, *Renfro v. Funky Door Long Term Disability Plan*, 686 F.3d 1044 (9th Cir. 2012) (permitting insurer to double dip by applying Social Security offset to two disability policies). AARP's brief will focus on the issue of overpayment of pension benefits to participants where typically a plan mistakenly or negligently overpays the unknowing and unsuspecting participant.

The Court's decision will have a direct and vital bearing on the economic security of millions of workers, including members of AARP. In light of the significance of the issues presented by this case, AARP respectfully submits this brief to facilitate a full consideration by the Court of these issues.

SUMMARY OF ARGUMENT

Because many retirees rely on modest amounts of pension benefits and retirement savings as a supplement to Social Security, requests for repayment of overpayments of these benefits can be devastating to participants' retirement security. Although plans admit that it is usually their fault for the pension benefit overpayments, plans still demand repayment of these overpayments with interest at the plan's rate of investment return. Because many plans wait for inordinate periods of time to recoup these benefits, the amounts that participants owe can be hefty. Because equity permits individuals who are

not at fault to establish equitable defenses against restitutionary claims, the equitable defenses of laches and changed circumstances should be permitted where a plan asserts a claim for restitution under ERISA.

ARGUMENT

I. IN ORDER TO AFFORD BASIC LIVING EXPENSES, MANY RETIREES RELY ON MODEST AMOUNTS OF PENSION BENEFITS AND RETIREMENT SAVINGS TO SUPPLEMENT SOCIAL SECURITY.

Approximately one-third of people over the age of 65 have earned regular payments from pensions or retirement savings.[4] *See* Ke Bin Wu, *Sources of Income for Older Americans, 2012*, AARP Pub. Policy Inst. 1 (2013), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2013/sources-of-income-for-older-americans-2012-fs-AARP-ppi-econ-sec.pdf. In 2012, the average amount of pension payments was $17,914 annually, with the median at $12,000. *Id.* at 3. Pensions and retirement savings supplement average monthly Social Security benefits. The average 2012 monthly Social Security benefit was $14,229 per year, with the median at

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[4] This income includes only regular payments such as an annuity or regular distribution from a traditional pension plan, 401(k) or Individual Retirement Account. Ke Bin Wu, *Sources of Income for Older Americans, 2012*, AARP Public Policy Inst. n.5 (2013), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2013/sources-of-income-for-older-americans-2012-fs-AARP-ppi-econ-sec.pdf.

$13,972. *See id.*, at 1; *see also* Sudipto Banerjee, *Income Composition, Income Trends and Income Shortfalls of Older Households*, Emp. Benefit Research Inst. 1, 5 (2013), http://www.ebri.org/pdf/briefspdf/EBRI_IB_02-13.No383.IncmEld.pdf (showing the income composition of older households, including Social Security and pension benefits) (hereinafter "Banarjee, *Income Composition*").

Given these modest amounts, it is not surprising that most retirees spend their retirement income on living expenses including medical care. *See* Sudipto Banerjee, *Expenditure Patterns of Older Americans, 2001-2009*, Emp. Benefit Research Inst. (2012), http://www.ebri.org/publications/ib/index.cfm?fa=ibDisp&content_id=4992. For example, a 65-year old couple retiring in 2014 will need approximately $220,000 to cover medical expenses throughout their retirement. Fidelity Viewpoints, *Retiree Health Costs Hold Steady*, Fidelity Inv. (June 11, 2014), https://www.fidelity.com/viewpoints/retirement/retirees-medical-expenses. Although the amount of pension and retirement income that individuals receive is modest, individuals with such income are likely to be able to pay their expenses in their retirement. Banerjee, *Income Composition* at 14 (individuals with pension income were less likely to face income deficits than those without).

II. ALTHOUGH PLANS CONCEDE THAT PARTICIPANTS GENERALLY ARE NOT AT FAULT FOR OVERPAYMENTS, PENSION PLANS DEMAND PARTICIPANTS REPAY BENEFITS WITH INTEREST, DESPITE HAVING THE DISCRETION TO RECOUP THESE OVERPAYMENTS FROM OTHER SOURCES AND WITHOUT REGARD FOR ANY HARDSHIP.

A. Incorrect Pension Benefit Payments Are Not Uncommon Due To The Complexity Of Pension Calculations.

Pension benefit calculations require the use of many different pieces of information (such as birthdate, compensation and years of service) which can be incorrect or incomplete. *See, e.g.*, Dep't of Labor, *10 Common Causes Of Errors In Pension Calculation*, http://www.dol.gov/ebsa/Publications/10common.html (last visited July 8, 2015). Incorrect calculations lead to both over and underpayments. *See* Press Release, Pension Benefit Guar. Corp., *Pension Plans: Standard Termination Audit Findings* (June 16, 1997), http://www.pbgc.gov/news/press/releases/pr97-31a.html (finding benefit calculation errors are not uncommon).

Moreover, as more defined benefit pension plans provide participants the option to receive their pension benefits as a lump sum payment, *see* Sudipto Banerjee, *Annuity and Lump-Sum Decisions in Defined Benefit Plans: The Role of Plan Rules*, Emp. Benefit Research Inst. (2013), http://www.ebri.org/

pdf/briefspdf/EBRI_IB_01-13.No381.LSDs2.pdf, more miscalculations occur. First, the annuity amount must be calculated using birthdates, years of service and compensation along with the appropriate multiplier. Second, converting the annuity amount into a lump sum requires calculating the present value of the annuity amount using certain interest rates and mortality tables, while excluding certain features under the annuity calculation. *See* U.S. Gov't Accountability Office, GAO-15-74, *Private Pensions: Participants Need Better Information When Offered Lump Sums That Replace Their Lifetime Benefits* 14-18, 19-22, 60-71 (2015); Dep't of Labor, Office of Inspector Gen., *PWBA Needs to Improve Oversight of Cash Balance Plan Lump Sum Distributions* 11-17 (2002) (finding 22 % of plans underpaid participants in cash balance plans).

Given the complexity of these calculations, the supposed expertise of pension plans, and the lack of knowledge and sophistication of participants, it is unsurprising that individuals would be totally unaware that a mistake has been made in their benefits determination. Not only are participants unprepared for their retirement benefit to be significantly reduced, but they are ill-equipped to have to pay back a portion of already received funds. Most often, participants will have already budgeted and spent received benefits to finance basic living expenses and are unable to absorb such a costly change in financial circumstances. *See* Sudipto Banerjee, *Expenditure Patterns of Older Americans, 2001-2009*, Emp. Benefit Research Inst. (2012),

http://www.ebri.org/publications/ib/index.cfm?fa=ibDisp&content_id=4992.

B. Although Fiduciaries Must Attempt To Recoup Overpayments, They Are Not Limited To Obtaining Repayment From The Participant.

While plan fiduciaries are required to attempt to recoup overpayments, plan fiduciaries have discretion in deciding from whom to seek the money. All three government agencies charged with overseeing ERISA plans require a plan fiduciary to attempt to recoup overpayments made to participants, but recognizing the potential hardship to participants, allow fiduciaries to use their discretion to determine the best manner to obtain the repayments from sources other than the participants.

The Internal Revenue Service (IRS) focuses on the requirement that fiduciaries must operate the plan in accordance with the plan terms and, accordingly, must attempt to recover erroneous payments. *See, e.g.*, Rev. Proc. 2013-12, 2013-4 I.R.B. 313 (Jan. 22, 2013), §§ 5.01(1)-(2), 5.01(2)(b), 6.02(1). The IRS considers incorrectly paid pensions as operational defects that must be corrected; otherwise, the plan could lose its tax qualification. *See id.* at §§ 5.01(2), (3)(c). Where there are overpayments at issue for a defined benefit or defined contribution plan, the plan can recover from the administrator, the plan sponsor or the participant. *See id.* at § 6.02(5), as amended Rev. Proc. 2015-27, 2015-16 I.R.B. 914 (Apr. 20, 2015), §§ 6.06(3),

6.06(4)(f); Rev. Proc. 2013-12, Appx. B, § 2.04(1)(a)(i). The plan must take reasonable steps not only to recover the overpayment itself, but "interest" at the rate of the plan's investment return. *See* Rev. Proc. 2013-12, Appx. B, § 2.04(1)(a)(i). However, if the amount is small, the participant cannot be found, or the collection costs would be burdensome, the IRS permits fiduciaries to forgo collection efforts. *See* Rev. Proc. 2013-12, § 6.02(5), as amended Rev. Proc. 2015-27, §§ 6.06(3), 6.06(4)(f); Rev. Proc. 2013-12, Appx. B, § 2.04(1)(a)(i).

In contrast, the emphasis for the Department of Labor is on the fiduciaries' prudence in discharging their duties. Relying on ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1), the Department has stated that a fiduciary has an obligation "to recover erroneous payments made from a plan." Dep't of Labor, PWBA, Advisory Opinion 77-08, 2 (Apr. 4, 1977), 1977 ERISA LEXIS 56. Depending on the circumstances, the fiduciaries may have numerous options to recover the erroneous payments including repayment from a third party administrator or the participant. *Id.* However, the fiduciary also can determine that recouping the benefits from the participant might cause too great a hardship on the participant or the cost might be too high for the amount recovered. *Id.*; *accord*, Dep't of Labor, PWBA, Advisory Opinion 77-07 (Apr. 4, 1977), 1977 ERISA LEXIS 55 (opining that offsetting of benefits to recoup a related plan's overpayment would be a breach of fiduciary duty). This discretion allows plan fiduciaries to recoup overpayments from other sources and can reduce the burden on unsophisticated plan participants.

Finally, the Pension Benefit Guaranty Corporation will recoup overpayments made to a participant by reducing future benefits, 29 C.F.R. §§ 4022.81(a), 4022.82(a), but the reduction is capped, 29 C.F.R. § 4022.82(a)(2), to prevent hardship to the participant.

Although a plan has options other than repayment directly from the participant, even where the overpayment was admittedly the plan's fault, many plans only attempt to obtain recovery from the participant.

C. Recoupment Of Overpayments Can Be Devastating To The Retirement Security Of Individuals.

A "secure, comfortable retirement is every worker's dream." Social Security Admin., *Retirement Planner: Plan For Your Retirement*, http://www.ssa.gov/planners/retire/ (last visited July 8, 2015). That dream is achievable "when you plan your finances." *Id.*; *see generally* Dept. of Labor, *Top 10 Ways to Beat the Clock and Prepare for Retirement*, http://www.dol.gov/ebsa/publications/10_ways_to_prepare.html (last visited July 8, 2015) ("The key to a secure retirement is to plan ahead."). Anticipated pension and annuity payments are critical parts of the retirement calculus. *See* Constantijn Panis, et al., *The Effects of Changing Social Security Administration's Early Retirement Age and the Normal Retirement Age*, Social Security Admin., 53 (2002), http://www.ssa.gov/policy/docs/contractreports/agereport.pdf (Prepared for SSA by RAND).

Yet these well-laid plans are capsized when there is a significant reduction in pension payments or a requirement to return a lump sum amount to the pension plan because the plan overpaid benefits. There has been a recent uptick in media stories about individuals who are informed that their retirement benefits were incorrectly calculated and they were overpaid. *See* Eleanor Laise, *Surprise, Retirees! Return the Benefits*, Kiplinger (July 2012), http://www.kiplinger.com/article/retirement/T037-C000-S001-surprise-retirees-return-the-benefits.html (hereinafter "Laise, *Surprise, Retirees!*"). Whatever caused these overpayments, the retirees usually have no idea that they have been overpaid and usually are shocked when there is a demand for a lump sum repayment or a slash in future benefits. *Id.*

The poster child for these types of stories is the Sheet Metal Workers Local 73 Pension Plan. In 2010, as a result of an audit,[5] the Pension Plan discovered it had been overpaying participants for up to thirty years. Even after discovering the overpayments, the plan did not demand repayment – with interest – for well over three years. One 79-year old pensioner was allegedly overpaid for seventeen years in the amount of $105,507, which included $44,525 in interest. *See*

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[5] AARP notes that pension plans are required to be audited annually. These audits include testing of the accuracy of benefit calculations. Dep't of Labor, Emp. Benefits Sec. Admin., Office of the Chief Accountant, *Assessing the Quality of Employee Benefit Plan Audits* 2, 17, 22, 42-43 (2015), http://www.dol.gov/ebsa/pdf/2014AuditReport.pdf. This certainly raises the issue of laches when plans wait inordinate periods of time to demand repayment.

Michelle Smith, *Pension Funds Aggressively Recouping Overpayments*, NewsMax Fin. (Oct. 25, 2013, 8:24 AM), http://www.newsmax.com/Finance/Personal-Finance/pension-sheet-metal-overpaid/2013/10/25/id/533046/ (hereinafter "Smith, *Pension Funds*); *see also* Pam Zekman, *2 Investigators: Pension Fund Demands Overpayments Back, With Interest*, CBS Chicago (Sept. 27, 2013, 10:03 PM), http://chicago.cbslocal.com/2013/09/27/2-investigators-pension-fund-demands-overpayments-back-with-interest/. Even small amounts of overpayments over a long period, combined with interest, makes a lump sum repayment devastating and impossible. Forcing retirees to pay back such a large amount threatens their financial security and their ability to afford basic expenses such as food, clothing, and shelter.

The Sheet Metal Pension Plan is just one of many pension plans that have been aggressively attempting to recoup overpayments. *See* Alyssa Rosenberg, *System error cuts DAK Americas employee's retirement package by $120,000*, WWAYTV3.com (Dec. 13, 2013, 2:00 AM), http://www.wwaytv3.com/2013/12/12/system-error-cuts-dak-americas-employees-retirement-package-120000/ (informing retirees that they must repay money due to employer's admitted, but unexplained, calculation error); Smith, *Pension Funds* (claiming an overpayment of $45,000 over five years, American Water Works Plan lowered pension to the correct amount; after deductions of $300 for repayment and health care premium, pensioner now receives less than $25 per month); Len Boselovic, *Accounting Mistakes Can Squeeze Pension Benefits*, Pittsburgh

Post-Gazette (July 6, 2014, 12:00 AM), http://www.post-gazette.com/business/2014/07/06/Accounting-mistakes-can-squeeze-pension-benefits/stories/201407060084 (after an audit, plan informed widow that she had been overpaid $19 per month for sixteen years; plan lowered pension benefit by $52 per month for the rest of her life, even if overpayment is repaid).

These demands for recoupment can turn the retiree's life upside down. Plans first adjust the monthly benefit to the correct amount. Plans then calculate the repayment amount with interest at the rate of the plan's investment return. The plans recoup the calculated amounts by demanding a lump sum payment, cutting future benefits, or both. A plan demands a lump sum payment when the plan concludes that the retiree will most likely die before making total repayment through benefit offsets, placing an even greater immediate financial stress on the individual. *See* Laise, *Surprise, Retirees!*.; Pam Zekman, *2 Investigators: Pension Fund Demands Overpayments Back, With Interest*, CBS Chicago (Sept. 27, 2013, 10:03 PM), http://chicago.cbslocal.com/2013/09/27/2-investigators-pension-fund-demands-overpayments-back-with-interest/; Adam Benson, *Former Triangle Wire Workers Fight to Retain Pensions*, The Bulletin (Dec. 23, 2014, 10:21 PM),http://www.norwichbulletin.com/article/20141223/NEWS/141229753 (70-year old retiree informed pension benefit had been incorrectly calculated for 22 years so benefit was lowered; 3 years later, plan not

only zeroed out the benefit to recoup the overpayment, but demanded an additional $900).

The impact on these retirees can be drastic. Not only are their benefits reduced, but they also may be asked to pay back sizable sums without any way to finance the unexpected costs with a supplemental source of income.[6] Many retirees do not even have the option of returning to work to make up the difference in their income due to the loss of benefits because they have been out of the workforce for so long. *Cf.* Gary Koenig, Lori Trawinski, & Sara Rix, *The Long Road Back: Struggling to Find Work After Unemployment*, AARP Pub. Policy Inst. (2015), http://www.aarp.org/content/dam/aarp/ppi/2015-03/The-Long-Road-Back_INSIGHT.pdf. (detailing difficulties of workers over age 55 finding employment). Moreover, the retirees may not have any significant assets to help with the financing of the repayment. *See* Ke Bin Wu, *Sources of Income for Older Americans, 2012*, AARP Pub. Policy Inst. 3-5 (2013), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2013/sources-of-income-for-older-americans-2012-fs-AARP-ppi-ec

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[6] Indeed, participants may be outside the permitted period to amend their tax returns to adjust for the repaid income. Individuals generally have three years in which to amend their tax returns to obtain a credit or refund. *See* Dep't of Treasury, Internal Revenue Service, *Instructions for Form 1040X, Amended U.S. Individual Income Tax Return* 2 (Rev. Dec. 2014), http://www.irs.gov/pub/irs-pdf/i1040x.pdf. We note that changes in individuals' income due to overpayments may also affect those individuals who were ordered to pay child support or alimony.

on-sec.pdf. Because retirees cannot absorb the large financial burden of repayment of the miscalculated funds along with their reduced payment, they may be forced to rely on government assistance to afford basic necessities such as food or electricity. *See* National Council of Aging, *BenefitsCheckUp*, https://www.benefitscheckup.org/find-help (last visited July 8, 2015) (explaining the various state, federal, and private benefits programs available to seniors to assist with payment for prescriptions, health care, food, utilities, and taxes, many based solely on amount of income).

Given the long timeframe before a demand for repayment of the miscalculated payments (with interest) is made, it is inequitable to force retirees living on fixed incomes to pay for the plan's mistake and negligence where the retiree is clearly not at fault. Indeed, after these long time periods, the retiree has usually experienced a significant change of circumstances, having spent the money, which they well may not have spent if they had not received it.

III. EQUITY PERMITS INDIVIDUALS WHO ARE NOT AT FAULT TO ESTABLISH EQUITABLE DEFENSES AGAINST RESTITUTIONARY CLAIMS AND SUCH DEFENSES SHOULD BE PERMITTED UNDER ERISA.

This Court has made clear that equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), means relief that was typically available in equity.

See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). Consequently, equitable restitution may be available to plans to recover overpayments, but such claims are also subject to equitable defenses such as changed circumstances and laches.

Restitution is an equitable remedy based on the fundamental principles of fairness. *See Restatements (Third) on Restitution and Unjust Enrichment* § 65 (Am. Law Inst. 2011). The law of restitution has long recognized that if an unknowing recipient of an overpayment has changed his or her position, restitution may not be required if to do so would be inequitable to the recipient. *See id.* As a defense to a claim for restitution, changes of position due to expenditure and consumption are fact dependent. *Id.* at § 65(c). Although spending on living expenses is frequently not considered a change of position, it is not quite so simple. If "the expenditure is one that would not have been made, but for the [over]payment," *id.*, most courts find that the recipient has suffered a change in circumstances and restitution would not be granted. *Id.*; *accord, Avon County Council v. Howlett*, [1983] 1 WLR 605 (Eng.) (change of circumstances permitted as defense where individual would not have purchased everyday items if he had not received said money); *RBC Dominion Securities Inc. v. Dawson*, [1994] 111 DLR (4th) 230 (Nfld.) (change of circumstances permitted as defense where individual used money for clothing and furnishings she would not have bought but for receipt of the money).

Moreover, if substantial time has elapsed between the overpayment and the claim for restitution or recoupment, many courts may conclude that requiring repayment after such a long time would be inequitable to the recipient. *Restatements (Third) on Restitution and Unjust Enrichment* §§ 65, 70 (Am. Law Inst. 2011).

Finally, if restitution would result in manifest hardship, some courts will conclude that the expenditure of the funds on living expenses would make it inequitable to require restitution. *Id.* at Reporter's Notes, c., illus. 12; *accord*, Dan B. Dobbs, 2 *Law of Remedies: Damages-Equity-Restitution* § 11.8 at 769-70 (2d ed. 1993) (noting restitution denied where overpayment used for medical bills).

Here, in the ERISA context, participants who are not at fault should not be required to repay overpayments made long ago, whether it is in a lump sum or through a reduction in future payments. At the very least, participants should be able to defend against the plan's restitutionary claims with appropriate equitable defenses including changed circumstances and laches.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed and the case remanded for further proceedings.

Respectfully Submitted,

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